SUPREME COURT, U.S.
FILED
DEC 9 1994
OFFICE OF THE CLERK

No. 94-826

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOHNSON & HIGGINS OF CALIFORNIA,
a California corporation,
DONALD F. REEVES, and ROY J. BERTOLDO,
Petitioners,

v.

STEINER CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

PETER W. BILLINGS, JR.
(Counsel of Record)
JAY B. BELL
JOHN E. S. ROBSON
FABIAN & CLENDENIN,
a Professional Corporation
215 South State Street
Twelfth Floor
P.O. Box 510210
Salt Lake City, Utah 84151
(801) 531-8900
Attorneys for Respondent
Steiner Corporation

Washington, D.C. • THIEL PRESS • (202) 328-3286

17 pp

QUESTIONS PRESENTED

In a malpractice case based solely on diversity jurisdiction:

1. Is a lump sum a "retirement-type subsidy" under 29 U.S.C. §1054(g)(2)(A) or is it an "optional form of benefit" under *id.* §1054(g)(2)(B) as the Tenth Circuit held?

2. In ruling on a proposed plan amendment which would have occurred prior to the effective date of Treas. Reg. §1.411(d)-4 A-1(a), did the Tenth Circuit err in holding that 29 U.S.C. §1054(g)(2)(B) prohibited only elimination of a lump sum benefit?

3. Did the Tenth Circuit err in its determination of what actions of the defendant constituted malpractice by assuming that the plaintiff's retirement plan had been amended by "administrative practice, usage and common consent"?

PARTIES IN THE COURT BELOW

All parties in the court below are identified in the caption of the petition. All subsidiaries of respondent are wholly owned except:

American Uniform Company
American Fine Foods
Linco Limited
Linen Supply Italiana
Drolet Saniforme, Inc.
Clean Room Products
Toalheiro Brazil
W/S Interests
Hokatex
Nippon Steiner
Steiner Portugal LOA
Rentex France
Nerite
Sanfresh B.D.

Page

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES IN THE COURT BELOW ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

STATUTORY PROVISIONS AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENTS & AUTHORITIES 7

I. The Tenth Circuit's Holding That A Lump Sum Is Not A "Retirement-Type Subsidy" Does Not Create A Conflict Among The Circuits 7

II. The Court Should Not Exercise Its Discretionary Jurisdiction Because The Tenth Circuit's Holding Is Limited To The Unique Facts Of This Case 9

III. The Tenth Circuit's Reversal Should Be Upheld On The Grounds That A Qualified Plan Cannot Be Informally Amended By "Administrative Practice, Usage And Common Consent" 11

CONCLUSION AND PRAYER 12

TABLE OF AUTHORITIES

Cases:

Bellino v. Schlumberger Technologies, Inc., 944 F.2d 26 (1st Cir. 1991) 11

Confer v. Custom Eng'g Co., 952 F.2d 41 (3d Cir. 1991) 11

Costantino v. TRW, Inc., 13 F.3d 969 (6th Cir. 1994) 6, 7, 8, 9

Elmore v. Cone Mills Corp., 23 F.3d 855 (4th Cir. 1994) 11

Cases, continued: Page

Miller v. Coastal Corp., 978 F.2d 622 (10th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1586, 123 L.Ed.2d 152 (1993) 11

Nachwalter v. Christie, 805 F.2d 956 (11th Cir. 1986) 11

Straub v. Western Union Tel. Co., 851 F.2d 1262 (10th Cir. 1988) 11

Statutes:

26 U.S.C.A. §411(d)(6)(1988) 2

29 U.S.C.A. §1002(22) (1985) 2

29 U.S.C.A. §1022(a)(1) (1985) 3

29 U.S.C.A. §1054(g) (1985) 2, 7

29 U.S.C.A. §1054(g)(2) (1985) 10

29 U.S.C.A. §1054(g)(2)(A) (1985) . . . . . i, 7

29 U.S.C.A. §1054(g)(2)(B) (1985) i

29 U.S.C.A. §1102(a)(1) (1985) 11

Rules and Regulations:

Rev. Rul. 79-90, 1979-1 C.B. 155. 4

Treas. Reg. §1.411(d)-3(b) (as amended in 1985) 2, 10

Treas. Reg. §1.411(d)-4 (proposed 1986 and adopted 1988) 6, 10

Treas. Reg. §1.411(d)-4 A-1(a) (proposed 1986 and adopted 1988) . . . . . i, 2, 9, 10

No. 94-826

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOHNSON & HIGGINS OF CALIFORNIA,
a California corporation,
DONALD F. REEVES, and ROY J. BERTOLDO,

Petitioners,

v.

STEINER CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, STEINER CORPORATION, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners, JOHNSON & HIGGINS OF CALIFORNIA, DONALD F. REEVES AND ROY BERTOLDO (collectively "J&H").

OPINIONS BELOW

The unreported Findings of Fact and Conclusions of Law of the United States District Court for the District of Utah, the Tenth Circuit's decision reported at 31 F.3d 935 and the Tenth Circuit's denial of J&H's petition for rehearing have all been reproduced in appendices A and B to J&H's Petition for Writ of Certiorari.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

This petition involves the "anti-cutback" provisions of the Employee Retirement Income Security Act ("ERISA"). The relevant statutes and regulations, 29 U.S.C.A. §1054(g) (1985), 26 U.S.C.A. §411(d)(6) (1988), Treas. Reg. §1.411(d)-4 A-1(a) and Treas. Reg. §1.411(d)-3(b) (as amended in 1985), have been reproduced at pages two through four of J&H's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This is a malpractice and breach of contract case. Jurisdiction is based solely on diversity of citizenship. Respondent Steiner Corporation ("Steiner") established and annually funded an employee retirement plan ("Plan"). Petitioners were Steiner's consulting actuaries and as such they provided Steiner with plan drafting and design services and annually calculated how much Steiner needed to contribute to the Plan. (FOF 7, 17, 20-22, App. B at 2, 6-7.)

The Plan's "normal retirement benefit"[1] was a monthly annuity based upon the employee's length of service and

---

[1] This term is defined in 29 U.S.C.A. §1002(22) (1985).

rate of pay. (Plan §9.1, Aplt. App. at 403-04.)[2] The Plan also gave retiring employees the option of electing to take a lump sum. The lump sum, under the language of the Plan, was supposed to be the "actuarial equivalent" of the annuity. (Plan §9.2, Aplt. App. at 404-05, 407.) "Actuarial equivalent" was defined by the Plan to be a "benefit having the same value as the benefit which the Actuarial Equivalent replaces." (Plan §1.17, Aplt. App. at 395.)

Consistent with the Plan language employees were told that the lump sum was "equal in value" to the annuity. As required under ERISA, each Steiner employee was given a Summary Plan Description ("SPD") which was supposed to describe accurately the benefits in words that an average employee would understand. 29 U.S.C.A. §1022(a)(1) (1985). J&H drafted and Steiner distributed to employees SPDs which described the lump sum as being "equal in value" or "mathematically equal" to the annuity. (FOF 20, App. B at 7.) Like other employees, Steiner's chief executive officer and chief financial officer at the relevant time assumed that the annuity and lump sum were equal in value.[3] (FOF 23, 27, 28, 32, 33, App. B at 7, 9-12; App. A at 5-6.) So apparently did the personnel at J&H who annually

---

[2]Citations to an appendix, other than Appendices A, B and C of the Petition for Writ of Certiorari, refer to an appendix filed in the Court of Appelas.

[3]Contrary to Petitioners' implication on page five of their petition, the District Court did not find, and the record does not show, that Steiner employees relied on the layered formula. The evidence was undisputed that employees were never told of the conversion formula or that it was favorable. (Aplt. App. at 209-11, 190-91, 155-56.) To the contrary, employees were affirmatively told in the SPD that the annuity and lump sum were equal in value. (FOF 20, 22, App. B at 7.)

calculated Steiner's contribution since they assumed in making the calculation that all employees would take the annuity. (FOF 18, App. B at 6.)

In fact, the lump sum as actually calculated by the Plan Administrator was not equal in value. Because of the conversion formula used by the Plan Administrator (referred to at trial and by the trial and appellate courts as the "layered formula"), the lump sum was more valuable than the annuity. (App. A at 4-5.) Until October 31, 1985, neither this layered formula nor any other conversion formula was incorporated into or referenced in the Plan. Instead, the Plan gave its actuary (J&H) the discretion to determine the interest rates and other assumptions to convert the annuity to a lump sum. (Plan §1.17, Aplt. App. at 395.)

Steiner's plan was typical of most plans in not specifying the actuarial assumptions to be used in determining "actuarial equivalence" for optional benefits. (Aplt. App. at 114, 116-17, 159, 286-88.) According to uncontested testimony at trial, the Internal Revenue Service ("IRS") became concerned about an employer or its actuary having such discretion because of fear that it might be used to discriminate depending on who was retiring. (Aplt. App. at 110-13.) The IRS, therefore, issued Revenue Ruling 79-90 which required that such actuarial assumptions "be specified within the plan in a manner which precludes employer [or its actuary] discretion." Rev. Rul. 79-90, 1979-1 C.B. 155. For Steiner's plan the effective date for this requirement eventually became October 31, 1985. (FOF 24, App. B at 8.)

Steiner, therefore, needed to amend its plan prior to October 31, 1985 to specify the actuarial assumptions for converting the annuity into a lump sum. Months before this deadline Steiner repeatedly asked J&H for

information which would have revealed to Steiner the cost of continuing to use the layered formula and that the lump sum was not equal in value. (App. A at 6-7.) J&H failed to provide this critical information until March 1986. Nor did J&H advise Steiner that it should consider changing the conversion formula so that the lump sum and annuity would be equal in value. *Id.* Instead, J&H simply incorporated the layered formula in the Plan amendments it prepared for Steiner. The District Court found, and the Tenth Circuit sustained, that J&H was negligent in these failures. (FOF 29, 30, 31, App. B. at 10-11; App. A at 6-8, 15.)

The District Court, however, held that Steiner suffered no damage from this negligence because the layered formula became part of the Plan by "administrative practice, usage and common consent" and, therefore, the conversion formula could not be changed without violating ERISA's anti-cutback provisions. (App. A at 8-9.) On appeal the parties briefed and argued the issue of whether the District Court had erred in holding that the layered formula was already part of Steiner's plan prior to October 31, 1985 because a plan could be informally amended by "administrative practice, usage and common consent." In reversing the District Court, the Tenth Circuit did not reach this issue. It "assum[ed] for purposes of this appeal that the Layered Formula was in fact a part of Appellant's Plan." (App. A at 10.) The Tenth Circuit nevertheless reversed because it held that Steiner's lump sum was neither an "early retirement benefit" nor a "retirement-type subsidy" and that Steiner was not proposing to eliminate an optional form of benefit. (App. A at 13-15.) Therefore, the Tenth Circuit held, the anti-cutback rules would not have prohibited the reduction of the lump sum conversion factors.

SUMMARY OF ARGUMENT

This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction for several reasons.

First, contrary to Petitioners' assertion, the Tenth Circuit's holding in this case is not in conflict with the decision of the Sixth Circuit in *Costantino v. TRW, Inc.*, 13 F.3d 969 (6th Cir. 1994). While both cases involved a lump sum, the Sixth Circuit was concerned with an "early retirement benefit" whereas the Tenth Circuit was construing the meaning of "retirement-type subsidy." No "early retirement benefit" is at issue in this case. Instead, what the Tenth Circuit held was that Steiner's lump sum option was not a "retirement-type subsidy." The Sixth Circuit did not address the question of whether a lump sum was a "retirement-type subsidy" since the lump sum in *Costantino* was clearly an "early retirement benefit."

Second, the Tenth Circuit's holding is expressly limited to a time period now long since passed. Petitioners cited Treasury Regulation §1.411(d)-4 which construed the prohibitions of ERISA more broadly than the Tenth Circuit did in this case. The Tenth Circuit acknowledged that the regulation interpreted the anti-cutback prohibitions of ERISA to apply to the reduction of an optional benefit as well as to the elimination of an optional benefit, but held that the regulation had no bearing on the dispute since its effective date was after the time period relevant in this case. The Tenth Circuit did not hold that the regulation was invalid or wrong. Thus, even assuming the Tenth Circuit was wrong in its statutory construction, the precedential impact of the holding is extremely limited, most probably to the facts of this case.

Third, the Tenth Circuit's reversal of the District Court was correct for reasons not reached by the Tenth Circuit. The Tenth Circuit agreed with Steiner's position that the anti-cutback prohibitions applied only to plan amendments, but assumed for purposes of the appeal that the District Court was correct in holding that a plan could be informally amended by "administrative practice, usage and common consent." The courts of appeal have consistently held that amendments to plans cannot be made informally.

ARGUMENTS & AUTHORITIES

I.

THE TENTH CIRCUIT'S HOLDING THAT A LUMP SUM IS NOT A "RETIREMENT-TYPE SUBSIDY" DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS.

The petitioners' primary basis for urging the Court to exercise its discretionary jurisdiction is their claim that the Tenth Circuit's holding is at odds with a single case. That case, *Costantino v. TRW, Inc.*, 13 F.3d 969 (6th Cir. 1994), is not in conflict with the Tenth Circuit's holding, and in fact was cited by the Tenth Circuit in support of its holding. (App. A at 12-13.)

It is true that both cases involved a lump sum. The facts and holding of each case, however, involved different issues and different language in the ERISA anti-cutback provisions. Section 1054(g)(2)(A) of 29 U.S.C. prohibits "eliminating or reducing" two distinct benefits: "an early retirement benefit" and "a retirement-type subsidy."[4] 29 U.S.C.A. §1054(g)(2)(A) (1985). In *Cos-*

---

[4] Section 1054(g) provides that

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan,

[footnote continued]

tantino the employer amended its plan to reduce the early retirement benefit for those electing lump sum. This clearly violated the statute since the statutory language expressly forbids elimination or reduction of early retirement benefits. *Costantino*, 13 F.3d at 977-78. The Sixth Circuit did not need to decide, and did not decide, whether a lump sum which was not an "early retirement benefit" was nevertheless a "retirement-type subsidy." This was, however, the question before the Tenth Circuit.

Moreover, the involvement of a lump sum was incidental to the Sixth Circuit's holding. A careful reading of *Costantino* reveals that the subsidy was not in the conversion formula as was the case with the Steiner plan. Instead, the subsidy considered by the Sixth Circuit was in the early retirement benefit. *Id.* a 973.[5] That is, the same lump sum conversion formula was used whether the retirement was early or at the normal age, but under

---

other than an amendment described in section 1082(c)-(8) or 1441 of this title.

(2) For purposes of paragraph (1), a plan amendment which has the effect of –

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. . . .

29 U.S.C.A. §1054(g)(1985).

[5]The employer in *Costantino* first amended to provide that early retirees electing the lump sum received no subsidy *and* the conversion factor used was the Moody's interest rates which resulted in a smaller lump sum. *Costantino v. TRW, Inc.*, 13 F.3d 969, 972 (6th Cir. 1994). Later the employer amended the plan again to use to proper conversion rates, but used the unsubsidized annuity as the basis for computing the lump sum for early retirees. *Id.* at 973.

the amendment the employer applied the formula to the unsubsidized early retirement annuity. *Id.* For example, if an early retiree's subsidized annuity was $1000 per month and the unsubsidized annuity was $750 per month (the amount which results in the earlier and longer aearly retirement annuity to be equal in value to the $1000 normal retirement annuity), the plan as amended used $750 to calculate the lump sum. Prior to amending the plan in *Costantino,* the employer had used the subsidized annuity as the starting point for calculating the lump sum for early retirees. That is why the Tenth Circuit cited the facts in *Costantino* as an example of a subsidy being

> a type of benefit specified in the plan as monthly annuities available to early retirees which exceed the annuities for those who retire at a normal retirement age because an early retiree's benefits last longer.

(App. A at 13.)

The Steiner lump sum had nothing to do with either an early retirement benefit or a subsidized annuity, and therefore, was factually distinct from *Costantino.*

II.

THE COURT SHOULD NOT EXERCISE ITS DISCRETIONARY JURISDICTION BECAUSE THE TENTH CIRCUIT'S HOLDING IS LIMITED TO THE UNIQUE FACTS OF THIS CASE.

The second basis Petitioners urge for exercise of the Court's discretionary jurisdiction is that the Tenth Circuit's holding is contrary to an Internal Revenue Regulation which prohibits elimination *or reduction* of an optional form of benefit. *See* Treas. Reg. §1.411(d)-4 A-1(a).

It is true that the Tenth Circuit strictly construed Section 1054(g)(2) of Title 29 by noting that the statute prohibited only *elimination* of an optional form of benefit, whereas the statute prohibited either elimination or reduction of "retirement-type subsidies." (App. A at 11-13.) It is also true that Treas. Reg. §1.411(d)-4 A-1(a) construes the statute more broadly by prohibiting either elimination or reduction of optional forms of benefit. The Tenth Circuit, however, acknowledged the regulation but held that since its effective date was after October 31, 1985 it "has no bearing on this dispute." (App. A at 13-14.) The Tenth Circuit did not hold that the regulation was invalid or wrong.

Thus, the Tenth Circuit's holding is limited to the unique facts of an employer attempting to change a lump sum conversion formula before the January 30, 1986 effective date of Treas. Reg. §1.411(d)-4. The lump sum conversion formula must further be one that subsidizes the lump sum over the annuity. Almost nine years have passed since the Treasury regulation went into effect. It is very unlikely, therefore, that the Tenth Circuit's holding on reducing optional forms of benefit, even if wrong, would have any precedential effect justifying exercise of the Court's discretionary jurisdiction.[6]

---

[6]The Petitioners also argue that the Tenth Circuit's decision is in conflict with Treasury Regulation §1.411(d)-3(b) (as amended in 1985). However, Petitioners' selective quotation of the Regulation leads to a misconstruing of its intent. When analyzed in full context, as was done by the Tenth Circuit (App. A at 14), this Regulation does not prohibit the decrease of an optional benefit. Instead, it gives guidance as to when plan amendments are to be aggregated in applying the anti-cutback rule. It states that "[f]or purposes of determining whether or not any participant's accrued benefit is decreased, all the provisions of a

[footnote continued]

III.

THE TENTH CIRCUIT'S REVERSAL SHOULD BE UPHELD ON THE GROUNDS THAT A QUALIFIED PLAN CANNOT BE INFORMALLY AMENDED BY "ADMINISTRATIVE PRACTICE, USAGE AND COMMON CONSENT".

For purposes of appeal, the Tenth Circuit assumed the primary issue on appeal – whether a plan could be informally amended by "administrative practice, usage and common consent." (App. A at 10-11.) Had the Tenth Circuit reached this issue it would have been compelled to reverse the District Court in any event. ERISA requires that "[e]very employee benefit plan shall be established and maintained pursuant to a *written instrument.*" 29 U.S.C.A. §1102(a)(1) (1985) (emphasis added). The layered formula was not amended into Steiner's plan pursuant to the formal amendment process until October 31, 1985. (Aplt. App. at 415.) Courts have consistently held that qualified plans cannot be modified orally or informally even when (unlike the facts in this case) employees have relied upon the informal amendments. *E.g., Elmore v. Cone Mills Corp.*, 23 F.3d 855, 861 (4th Cir. 1994); *Miller v. Coastal Corp.*, 978 F.2d 622, 625 (10th Cir. 1992), *cert. denied*, ___ U.S. ___ , 113 S.Ct. 1586, 123 L.Ed.2d 152 (1993); *Confer v. Custom Eng'g Co.*, 952 F.2d 41, 43 (3d Cir. 1991); *Bellino v. Schlumberger Technologies, Inc.*, 944 F.2d 26, 33 n.8 (1st Cir. 1991); *Straub v. Western Union Tel. Co.*, 851 F.2d 1262, 1265 (10th Cir. 1988); *Nachwalter v. Christie*, 805 F.2d 956, 959-61 (11th Cir. 1986).

---

plan affecting directly or indirectly the computation of accrued benefits [i.e., an optional benefit] which are amended with the same adoption and effective dates shall be treated as one plan amendment." *Id.* This regulation does not change the requirement for an "accrued benefit". Neither the Reguation nor the case law provide that a lump sum option is such an "accrued benefit."

CONCLUSION AND PRAYER

This case does not present a conflict among the circuits. The Tenth Circuit's holding is limited to the unique facts of the case which are very unlikely to be repeated due to the subsequent effective date of an Internal Revenue Service regulation. Moreover, even if the basis for the Tenth Circuit's holding was wrong, the right result was obtained. Steiner Corporation, therefore, prays that the Court deny the Petition for Writ of Certiorari because the case presents no issue appropriate for the Court's review.

Respectfully submitted,

PETER W. BILLINGS, JR.
JAY B. BELL
JOHN E. S. ROBSON
FABIAN & CLENDENIN,
a Professional Corporation
215 South State Street
Twelfth Floor
P.O. Box 510210
Salt Lake City, Utah 84151
(801) 531-8900

Attorneys for Respondent
Steiner Corporation